No. 03-1545

Supreme Court, U.S.
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In The

Supreme Court of the United States

STEPHEN WOLK and HELEN J. WOLK,

Petitioners,

v.

ORANGE COUNTY, FLORIDA, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

RESPONDENTS ORANGE COUNTY, TERRY BOSTON, MARLENE REILLY, EDWARD A. FRENK, EDWARD J. FOX, JR., MELVIN PITTMAN AND GEORGE DORSETT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Although Petitioners in their Initial Brief presented three questions for review, Respondents disagree with the manner in which they are framed and respectfully restate the questions presented as follows:

I. WHETHER THIS CASE PRESENTS A CONFLICT OF DECISIONS AMONGST THE FEDERAL CIRCUIT COURTS OF APPEALS, OR WITH A STATE COURT OF LAST RESORT, OR WITH THIS COURT SO AS TO WARRANT THIS COURT EXERCISING ITS DISCRETIONARY JURISDICTION TO REVIEW THIS PETITION FOR WRIT OF CERTIORARI.

II. WHETHER THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT PROPERLY AFFIRMED THE DISMISSAL BY THE TRIAL COURT OF PETITIONERS' AMENDED COMPLAINT WHICH ATTEMPTED TO ALLEGE DUE PROCESS VIOLATION CLAIMS UNDER THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION PURSUANT TO 42 U.S.C. § 1983 AGAINST RESPONDENTS.

III. WHETHER THERE IS A COMPELLING REASON TO GRANT THE PETITION FOR WRIT OF CERTIORARI.

PARTIES AND CORPORATE DISCLOSURE STATEMENT

Petitioners correctly identify the parties. Pursuant to Rule 29.6 of the Rules of the Supreme Court of the United States, Respondents state that no nongovernmental corporations or publicly held companies are a party to this action.

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The unreported order of the court of appeals is reproduced in Petitioners' Appendix A. The unreported opinion of the district court is reproduced in Petitioners' Appendix B. The unreported order of the court of appeals denying Petitioners' Petition for Rehearing and Petition for Rehearing En Banc is reproduced in Petitioners' Appendix C.

JURISDICTION

The United States District Court for the Middle District of Florida, Orlando Division, entered its order dismissing the Petitioners' Amended Complaint on November 5, 2002. The United States Court of Appeals for the Eleventh Circuit entered its per curiam affirmance of the district court's order on November 18, 2003. The United States Court of Appeals for the Eleventh Circuit entered its order denying the Petitioners' Petition for Rehearing and Petition for Rehearing En Banc on February 10, 2004. Petitioners filed their Petition for Writ of Certiorari on May 3, 2004. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

I. Procedural Background

On February 2, 2001, Petitioners, Stephen Wolk and Helen J. Wolk, filed a Complaint in the United States District Court for the Middle District of Florida, Orlando Division, against W. Robert Humble, Joseph Perkins, Ronald Hill, Jimmy Wrye, Mary Kaschai, Fran Wyatt, W. Steven Rogers, Jim Powers, Beverly Boyer, Joel Hammock,

Mark Chernega, Daniel Mantzaris, and Drage de Beaubien, Knight, Simmons, Mantzaris & Neal, P.A. (hereinafter collectively referred to as the "Code Enforcement Defendants") and Orange County, Terry Boston, Marlene Reilly (as personal representative of the estate of Joseph J. Reilly), Edward A. Frenk, Edward J. Fox, Jr., Melvin Pittman, and George Dorsett (hereinafter collectively referred to as the "Orange County Defendants"). On or about May 24, 2001, Petitioners filed an Amended Complaint. This Brief in Opposition to Petition for Writ of Certiorari is filed on behalf of the Orange County Defendants.

Both the Orange County Defendants and the Code Enforcement Defendants filed Motions to Dismiss in the trial court. On April 5, 2002, the trial court issued a "Notice of Hearing, Request for Additional Briefings, and Certification to the Attorney General to the State of Florida" directing the parties to file supplemental briefs, scheduling the pending motions for hearing on April 26, 2002 and inviting the Florida Attorney General to appear on behalf of the State of Florida since the constitutionality of a Florida Statute was being called into question by the Amended Complaint.

After the hearing held on April 26, 2002, the trial court issued an order dismissing Petitioners' Amended Complaint in its entirety. Petitioners filed a Notice of Appeal to the United States Court of Appeals for the Eleventh Circuit on December 4, 2002. On November 18, 2003, the Eleventh Circuit affirmed per curiam the district court's order. Thereafter Petitioners filed a Petition for Rehearing and Petition for Rehearing En Banc which was denied by the United States Court of Appeals for the Eleventh Circuit on February 10, 2004. Petitioners filed a

Petition for a Writ of Certiorari to this Court on May 3, 2004.

II. Factual Background

The Petitioners are record owners of property located at 401 Niblick Avenue, Orlando, Florida, known as the "Dubsdread Apartments." On August 9, 1996, an inspection of the Dubsdread Apartments was conducted by Orange County Inspectors, Reilly and Frenk, during which violations of the Orange County electrical code were found. A citation was issued by Inspector Reilly to the Petitioners directing them to correct the violations by August 26, 1996. A reinspection was conducted at the "Dubsdread Apartments" and the inspectors determined that the violations had not been corrected. On September 24, 1996, Inspector Reilly requested a hearing before the Orange County Code Enforcement Board (hereinafter referred to as the "CEB"). Formal notice was given to the Petitioners of a scheduled hearing on the violations which was held before the CEB on November 20, 1996. Stephen Wolk, the son and attorney for the Petitioners attended the hearing and had the opportunity to offer testimony and present evidence. Inspector Reilly also presented testimony to the CEB regarding the violations. At the conclusion of the hearing, the CEB found that the electrical code violations existed, had not been corrected and that said violations should be corrected by December 4, 1996. The order informed the Petitioners that if the violations were not cured by December 4, 1996, the Petitioners would be fined up to $250.00 per day until the violations were corrected. Moreover, the order made findings that the violations presented a serious threat to the public health, safety and welfare and instructed the Petitioners to contact the code

inspector for reinspection. Although the Orange County Code permitted an appeal from such an order, the Petitioners did not appeal the CEB order of November 20, 1996.

After several reinspections of the Dubsdread Apartments, Inspector Frenk issued an inspection notice violation regarding electrical violations on the property. On January 15, 1997, the Petitioners advised Inspector Reilly that they would not perform any additional work as requested by Inspector Reilly to bring the property into compliance. Thereafter, on February 7, 1997, Inspector Reilly filed an Affidavit of Non-compliance with the CEB stating that the Petitioners had not complied with the November 20, 1996 CEB order. On March 19, 1997, the CEB issued an order imposing a fine of $250.00 per day against the Petitioners with the limitation of the fine commencing on December 4, 1996. On April 7, 1997, the order imposing the fine was recorded in the public records of Orange County, Florida and the order then became a lien against the Petitioners' property. On April 16, 1997, the Petitioners filed a motion to vacate the fines imposed by the CEB, which motion was denied by the CEB.

At the request of Petitioners, on June 22, 1998, the "Dubsdread Apartments" were reinspected by Orange County Inspector Vern Ogden. After inspecting the property, Mr. Ogden issued an inspection notice citation regarding electrical violations at the property setting forth the nature of the violations and repair work needed to bring the property into compliance with the Orange County Code. On December 3, 1998, Inspector Ogden issued an Affidavit of Compliance. Because the fines continued to accrue retroactively from December 4, 1996

until December 3, 1998, the total fines imposed against the Petitioners had accrued to $182,000.00.

On January 20, 1999, Petitioners' daughter, Gina L. Wolk, a co-owner of the "Dubsdread Apartments" and a non-party to the CEB action, filed a motion to reduce the amount of the fine. Pursuant to Ms. Wolk's motion, the CEB reduced the fine from $182,000.00 to $100,000.00. Thereafter, the Petitioners filed a motion to vacate the orders imposing the fine and lien which was denied by the CEB. The Petitioners appealed the CEB order denying the Petitioners' motion to vacate the orders to the Ninth Judicial Circuit Court of Florida. In the appeal proceedings, the Petitioners requested that the fine be reduced to $18,000.00. On January 8, 2001, the Ninth Judicial Circuit Court of Florida remanded the case to the CEB directing the CEB to further reduce the fine. On February 21, 2001, the CEB entered an order reducing the fine to $10,000.00 if paid by March 23, 2001, and directing that if the fine was not timely paid that it would be increased to $18,000.00.

On February 2, 2001, Petitioners filed the instant action in the United States District Court for the Middle District of Florida and on March 23, 2001, the Petitioners filed a state court action in the Ninth Judicial Circuit Court of Florida alleging in large measure the same claims alleged in the instant action. In connection with the filing of the state court action on March 23, 2001, the Petitioners deposited $10,000.00 into the registry of the Ninth Judicial Circuit Court of Florida.

III. The Statutory Scheme of the State Statute and the Orange County Ordinances Being Challenged by the Petitioners

The Petitioners' main contention is that Orange County's code enforcement ordinances which are modeled after Florida's code enforcement statutes, Chapter 162 of the Florida Statutes, is unconstitutional on its face because the statutory scheme authorizes the CEB to enter an order imposing a per diem fine and a lien against a property owner's property prior to a hearing being held on the accuracy of the affidavit of noncompliance and imposition of a per diem fine and lien. Petitioners argue that the statutory scheme is unconstitutional because it fails to provide adequate due process because of the lack of the requirement for an additional hearing prior to imposition of a fine and lien even though the property owner is provided with notice and an opportunity to be heard prior to the initial order by the CEB finding a violation or violations of the Orange County Code. The Petitioners challenge the constitutionality of both the state and county code enforcement provisions. The county and state code enforcement provisions shall, collectively, be referred to as the statutory scheme. References to the Orange County Code shall be designated as Orange County Code with the code section and references to the state code will be designated as Florida Statutes with the code section.

Under the statutory scheme, Orange County employs inspectors who are charged with inspecting properties to determine if there are violations of the Orange County Code. If a code enforcement inspector finds violations of the code, the code enforcement inspector notifies the violator and gives him or her a reasonable opportunity to correct the violations. Orange County Code § 11-34(b)

and Florida Statutes § 162.06(2). If the violations continue beyond the date set by the inspector for correction, the inspector is authorized to notify the CEB and request a hearing on the violations Orange County Code § 11-34(b) and Florida Statutes § 162.06(2). The CEB then schedules a hearing and provides notice to the property owner of the hearing. Orange County Code § 11-34(b) and Florida Statutes § 162.06(2). At the public hearing, testimony is provided by the code inspector and any witnesses and the property owner if the property owner chooses to be heard. Orange County Code § 11-35(c) and Florida Statutes § 162.07(3). At the conclusion of the hearing, the CEB issues finding of facts, conclusions of law, and an order as to whether the violations exist. If the CEB finds that a violation or violations exist, the order will require that the violations be corrected by a specific date. The order may also, if appropriate, provide that if the violations are not corrected by such date, that a fine may be imposed. Orange County Code § 11-35(f) and Florida Statutes § 162.07(4). Additionally, the order may provide that if the violations are not corrected by the date specified, that a certified copy of the order may be recorded in the public records and shall then become a lien upon the property owner's property. Orange County Code § 11-37(a) and Florida Statutes § 162.09(1).

Under the statutory scheme, if a finding of a violation has been made by the CEB at the initial hearing, a subsequent hearing is not required for issuance of the order imposing the fine or the lien. Orange County Code § 11-37(a) and Florida Statutes § 162.09. The fine continues to accrue until the violator either brings the property into compliance or until the lien is foreclosed and a judgment is rendered, which ever occurs first. Orange County Code

§ 11-37(c) and Florida Statutes § 162.09(3). Under the statutory scheme, final administrative orders of the CEB are appealable to the Ninth Judicial Circuit Court of Florida. Orange County Code § 11-40 and Florida Statutes § 162.11.

The purpose and intent of the statutory scheme is to promote, protect and improve the health, safety and welfare of citizens by creating an administrative board with authority to impose fines and other non-criminal penalties to provide an equitable, expeditious, effective and inexpensive method of enforcing the codes. Orange County Code § 11-29 and Florida Statutes § 162.02.

REASONS FOR DENYING THE PETITION

I. THE PETITION DOES NOT PRESENT A CASE WHICH PRESENTS A CONFLICT OF DECISIONS AMONGST THE FEDERAL CIRCUIT COURTS OF APPEALS, OR WITH A STATE COURT OF LAST RESORT, OR WITH THIS COURT.

As grounds for requesting that this Honorable Court exercise its discretionary jurisdiction, Petitioners contend that the decision below conflicts with the entire line of this Court's decisions on procedural due process and with that of the Florida state court of last resort which is the Florida Supreme Court. Petitioners argue that the decisions below are a glaring departure from the entire body of federal and state law. However, a review of the decision of the United States Court of Appeals for the Eleventh Circuit and the United States District Court for the Middle District Court of Florida, clearly demonstrates that such decisions do not

conflict with any decision of this Honorable Court or the United States Court of Appeals or the Florida Supreme Court.

Contrary to Petitioners' contention, the underlying 43 page order from the United States District Court for the Middle District Court of Florida, Orlando Division, thoroughly analyzed the statutory scheme and the procedural due process procedures provided by said statutory scheme and followed the parameters of procedural due process set forth in this court's seminal case of *Matthews v. Eldridge*, 424 U.S. 319 (1976). The district court below took great pains to demonstrate how its decision followed this Court's long line of established jurisprudence with respect to procedural due process and the safeguards mandated by this Court.

The underlying order of the district court analyzed the facts in the instant case in the context of the three part balancing test set forth in *Matthews*, i.e., the private interest that will be affected by the official action of the CEB; the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and Orange County's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail. In applying the *Matthews* balancing test the district court gave due consideration to the fact that the imposition of a fine or lien by the CEB affected the Petitioners' property interest in owning and enjoying Petitioners' property without encumbrances from CEB liens and further recognized that because Petitioners' property interests were affected, that Petitioners were entitled to certain due process protections.

The district court weighed the degree of potential deprivation involved in the imposition of a lien on Petitioners' property by the CEB and determined that the lien constitutes a temporary, partial encumbrance as opposed to a total loss of ownership rights. In applying the first prong of the *Matthews* balancing test to the facts at hand the district court noted that although Petitioners' property interest in being free from encumbrances triggered, certain due process procedures, that the length of the temporary partial encumbrance was to a large extent within the control of the Petitioners. The district court also observed that under the statutory scheme, the Petitioners could eventually obtain nearly complete retroactive relief from a fine or lien imposition order and could apply to the CEB for removal or reduction of the fine. In fact, after obtaining the affidavit of compliance in December 1998, Petitioners through the exercise of motions and appeals were successful in having the fine reduced from $182,000.00 to $10,000.00.[1]

In applying the second prong of the *Matthews* balancing test, the district court properly relied upon where appropriate, and distinguished where appropriate, prior holdings of this Court addressing the risk of erroneous deprivation and the probable value of additional or substitute procedural safeguards. In the instant case, the Petitioners under the statutory scheme were first provided with a violation notice by an inspector and provided with an opportunity to correct the violation. Failing to correct

[1] This is perhaps the best evidence of the fact that the statutory scheme provides appropriate due process safeguards.

the violation, the inspector notified the CEB which scheduled the matter for a hearing after proper notice to the Petitioners. During the hearing, both the Petitioners and the inspector were given the opportunity to make a presentation to the CEB which ultimately issued an order informing Petitioners that it had determined that electrical code violations existed and that if the violations were not corrected by a certain date, a per diem fine would be imposed upon Petitioners' property until the property was brought into compliance and further that the order imposing the fine could be recorded in the public records and become a lien upon the Petitioners' property.

Since the Petitioners were afforded notice and an opportunity to be heard regarding the existence of the violations before the CEB, and because the CEB, after reviewing the evidence presented by the Petitioners' and the inspector, made a determination that electrical code violations existed, the risk of an erroneous imposition of a fine or lien under the code enforcement scheme was extremely low even though the statutory scheme did not provide for additional hearings after the code inspector reinspected the property for compliance. The action of the code inspector in reinspecting the property for compliance with the electrical code, at this point, became a relatively ministerial act.

Under such circumstances, the district court reasoned that the ministerial act of reinspecting to determine compliance with the electrical code, carries with it a minuscule risk of error and does not require an additional full-blown evidentiary hearing. The district court correctly noted that electrical code compliance is easily discernable by a trained inspector with a low risk of error as the determination of compliance does not turn on credibility of

witnesses or other intangible issues such as may have been the case in *Connecticut v. Doehr*, 501 U.S. 1 (1991). In accordance with the second prong of the *Matthews* balancing test, when the risk of error is low, whether further evidentiary or oral presentation opportunities are required by due process, must be weighed against the probable value of such evidentiary hearings or oral presentations. The district court correctly ruled that under the circumstances presented the risk of error was low and that further hearings on such technical issues of compliance with an electrical code, after an initial finding of violations by the CEB, would be of little added benefit.

In applying the last prong of the *Matthews* balancing test, i.e., the governments' interest, the district court again considered the *Doehr* case, which involved a state statute which allowed prejudgment attachment based solely on the affidavit of a private litigant, filing an unrelated tort suit against a property owner. The *Doehr* court held that such a statutory scheme did not comport with due process. However, the factual scenario in this case is significantly different from the *Doehr* scenario. The interest of Orange County is far different from the interest of a private litigant who stands to gain from filing an affidavit which results in a prejudgment attachment against the private litigant's adversary. The purpose of the code enforcement statutory scheme is to promote, protect and improve the health, safety and welfare of the public through an equitable, expeditious, effective and inexpensive method of code enforcement. This legitimate governmental interest would be significantly hampered by imposing procedures requiring potentially multiple hearings, after the initial determination hearing with little or no additional value added

to the process. Such inspection was deemed to be ministerial much like the issue of determining whether disability benefits should be terminated.

After applying the *Matthews* balancing test, the district court properly ruled that the statutory scheme provided a low risk, fair procedural process prior to the imposition of a temporary fine and/or lien against the Petitioners' property. Additionally, under the statutory scheme, the Petitioners through motions, hearings and appeals, were provided with the opportunity to obtain relief after the temporary imposition of a fine and/or lien. Under such circumstances, the statutory scheme at issue provides adequate procedural due process in keeping with this Court's long line of cases mandating appropriate due process and contrary to Petitioners' contention does not conflict with federal jurisprudence on procedural due process.

Petitioners also contend that the district court's order and the circuit court of appeals per curiam affirmance, conflicts with decisional law of the Florida Court of last resort, i.e., the Florida Supreme Court. Petitioners rely upon the case of *County of Pasco v. Riehl*, 635 So. 2d 17 (Fla. 1994) for this proposition. However, Petitioners' reliance upon *Riehl*, just likes its reliance upon *Doehr*, is misplaced, as both cases are clearly distinguishable from the case at hand. In the *Riehl* case, the Florida Supreme Court addressed the issue of the constitutionality of an ordinance which allowed a dog to be classified as a dangerous animal and to be impounded without a predeprivation hearing, based solely on an affidavit from a citizen alleging that the dog was dangerous. The Florida Supreme Court held that such a statutory scheme was unconstitutional for failure to provide notice and an opportunity to be

heard prior to classification of the dog as a dangerous dog and impoundment of the dog.

The factual scenario before this court is clearly distinguishable from that in the *Riehl* case, in that the Petitioners, under the code enforcement statutory scheme, are initially provided with notice and an opportunity to be heard prior to a finding of a violation. Additionally, even though an additional hearing is not provided for under the statutory scheme, prior to the imposition of fines or a lien if the violation is not corrected, the property owner is afforded other procedures for addressing the property owner's concerns such as an appeal of the compliance order to the state circuit court. Additionally, the property owner under the code enforcement statutory scheme is not precluded from presenting and/or filing written evidence of compliance or motions to vacate the fine/lien order or appealing a non-compliance affidavit to the Orange County Board of Adjustments and Appeals and thereafter to the Circuit Court of Florida.[2] Under such circumstances, the existing statutory scheme provides adequate due process safeguards for the Petitioners in keeping with the parameters established in this Court's precedent and the precedent established by Florida's court of last resort.

No Florida court has ruled that the statutory code enforcement scheme of Florida Statutes Chapter 162 is unconstitutional. Florida appellate courts reviewing the

[2] Under Orange County Code § 9-14, a property owner is authorized to appeal a decision of the building official such as a code inspector to the Orange County Board of Adjustments and Appeals and thereafter may appeal further through a petition for writ of certiorari to the Ninth Judicial Circuit Court of Florida.

statutory code enforcement scheme have accepted the presumption that the code enforcement scheme is facially constitutional. In *Michael D. Jones, P.A. v. Seminole County*, 670 So. 2d 95 (Fla. 5th DCA 1996), the Fifth District Court of Appeal of Florida noted that presumably Florida Statutes § 162.09 would be interpreted to permit the presentment of defenses prior to enforcement of any lien and that, **the statute provides for the fundamental due process requirements of notice and a hearing, making of a record, and appeal, although such an appeal is not *de novo*.** *Id.* at 96. In *Verdi v. Metropolitan Dade County*, 684 So. 2d 870 (Fla. 3d DCA 1996), *rev. denied*, 695 So. 2d 703 (Fla. 1997), the Third District Court of Appeal in reviewing other unrelated issues of the code enforcement scheme did not note any constitutional infirmity in the statutory scheme.

In *Massey v. Charlotte County, Florida*, 842 So. 2d 142 (Fla. 2d DCA 2003), a case where the Appellant challenged Charlotte County Florida's code enforcement scheme,[3] the *Massey* court stated in its analysis that " . . . we are not required to determine in this case whether the statute [Florida Statutes Chapter 162] is facially unconstitutional. However, in this context we have previously noted, it is necessary to fill the procedural gaps in Chapter 162 by the common-sense application of basic principles of due process." *Id.* at 145. The *Massey* court concluded that the Masseys were not afforded appropriate procedural due process by the CEB. However, the *Massey* court expressly

[3] The *Massey* court is not a state court of last resort. It is a Florida district court of appeal on equal footing as the courts in *Michael D. Jones, P.A.* and *Verdi*, *supra*.

declined to mandate any specific procedure that the code enforcement board would be required to follow and declined to hold the statutory scheme unconstitutional.

Further, *Massey* is distinguishable from the case at hand as it is not clear whether the Masseys had an opportunity to request a reduction of the fine imposed on them as the Wolks did in the case at bar or what other opportunities the property owners may have had to contest the affidavit of noncompliance such as through presentation of written evidence or motions or an appeal to the Board of Adjustment and Appeals, as is permitted under the Orange County statutory scheme. The *Massey* court did not certify to the Florida Supreme Court, the question of the constitutionality of the code enforcement scheme or the procedural due process issues as being matters of great public importance of creating a conflict with the Florida Supreme Court or any other Florida appellate court.

Although Petitioners mischaracterize the facts of this case as a flagarant constitutional violation to their due process rights, the district court's order correctly held in keeping with established jurisprudence of this Court and the Florida Supreme Court, that the code enforcement statutory scheme does not unconstitutionally deprive the Petitioners of their rights to due process.

II. THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT PROPERLY AFFIRMED THE DISMISSAL BY THE TRIAL COURT OF PETITIONERS' AMENDED COMPLAINT.

The Amended Complaint was properly dismissed by the district court with an affirmance by the Court of

Appeals for the Eleventh Circuit as the Amended Complaint was not adequate to withstand the motions to dismiss filed by the Respondents. Petitioners contend that the Amended Complaint was adequate to state a cause of action and should not have been dismissed because the Amended Complaint contained allegations that orders were issued imposing a fine and a lien on Petitioners' property without notice and a hearing in violation of Petitioners' due process rights. Petitioners' contention is that under the standard for review for motions to dismiss, said allegations should have been accepted by the district court as true and that based solely on these allegations the Amended Complaint should not have been dismissed.

In order to accept Petitioners' theory one would also have to accept the premise that the trial court below was required to accept Petitioners' legal conclusion that the order imposing the fine and the lien without notice and an opportunity to be heard was a per se violation of the Petitioners' due process rights. Neither the trial court, nor the court of appeals were required to accept such unfounded or improper conclusions of law simply because Petitioners asserted them on the face of the Amended Complaint. Certainly, well established jurisprudence provides that for purposes of a motion to dismiss, all well pled facts are accepted as true and the reasonable inferences from such facts are to be construed in the light most favorable to the plaintiff. However, unsupported conclusions of law and of mixed fact and law have long been recognized not to prevent a Rule 12(b)(6) dismissal when appropriate. It has long been established jurisprudence, that conclusory allegations and unwarranted deductions of fact are not required to be accepted by a court as true, in ruling on a motion to dismiss. *South Fla. Water Mgmt.*

Dist. v. Montalvo, 84 F.3d 402, 408 n.10 (11th Cir. 1996); and *Gonzalez v. Reno*, 325 F.3d 1228 (11th Cir. 2003).

Additionally, although the district court must accept as true all well-pled allegations, it is also entitled to make reasonable inferences from the allegations in the Amended Complaint as stated and any attachments to the complaint. The trial court below is required to analyze Plaintiffs' allegations of due process violations in the context of the actual due process afforded to the Plaintiffs as alleged in the Amended Complaint and its attachments and not based solely on the Petitioners' bare allegations to the contrary. Such analysis necessarily requires an in-depth review of the relevant statutory scheme and code provisions challenged by the Petitioners and an application of the facts as alleged in the Amended Complaint and set forth in exhibits attached to the Amended Complaint against existing legal precedent. Ultimately, the district court correctly determined that even when viewed in the light most favorable to the Petitioners, the Amended Complaint did not state a cause of action for violation of procedural due process when analyzed under the balancing test set forth in *Matthews v. Eldridge* and its progeny.

In applying the *Matthews* balancing test, the district court was not required to accept Petitioners' unfounded conclusions of law and unwarranted deductions of fact and allegations which were clearly contradicted by statutory provisions and attachments to the Amended Complaint. As a review of the Amended Complaint and attachments thereto, revealed, the Petitioners, in fact, had both pre-deprivation and post-deprivation due process under the statutory scheme and under the due process parameters set forth in *Matthews*. Therefore, the

district court correctly dismissed the Amended Complaint and the Court of Appeals for the Eleventh Circuit properly affirmed the district court's dismissal.

Petitioners further contend that the issue of qualified immunity was prematurely and improperly addressed by the district court. However, Petitioners' fail to accept the fact that the district court's dismissal of the Amended Complaint was not based solely upon the qualified immunity defense of the individual Respondents, but was instead based upon the district court's reasoning that no due process violation had occurred with respect to the Petitioners. The district court addressed the issue of qualified immunity as to the Respondents in their individual capacities as an informational tool, but made it clear in its order that the dispositive basis for the dismissal was that the statutory scheme was not facially unconstitutional and accordingly no constitutional violation had occurred. Without a constitutional violation, there can be no violation of a clearly established right. *Smith v. Siegelman*, 322 F.3d 1290 (11th Cir. 2003).

Additionally, Petitioners fail to observe the established rule that qualified immunity is an entitlement not to stand trial or face the other burdens of litigation and that questions of qualified immunity are to be resolved at the earliest possible state in litigation. It is appropriate for a district court to grant the defense of qualified immunity to individuals at the motion to dismiss stage if the complaint fails to allege a violation of a clearly established constitutional right. A defendant may assert his qualified immunity defense, prior to trial, in one of three ways, all of which require the trial court to consider the issue of qualified immunity as a matter of law. First, a defendant may move for a dismissal under Fed.R.Civ.P. 12(b)(6) for

failure to state a claim. Second, the defendant may raise his affirmative defense in his answer and move under Fed.R.Civ.P. 12(c) for judgment on the pleadings. Third, the defendant may present matter outside the pleadings and move for summary judgment under Fed.R.Civ.P. 56(e). *See Bennett v. Parker*, 898 F.2d 1530 (11th Cir. 1990).

III. PURSUANT TO RULE 10 OF THE UNITED STATES SUPREME COURT, THERE IS NO COMPELLING REASON TO GRANT THE PETITION FOR WRIT OF CERTIORARI.

Even if one were to assume for the sake of argument, that the dismissal was improvidently granted in favor of the Respondents, such would not be a valid reason for this Court to exercise its certiorari review. Rule 10 of this Court provides in pertinent part that: "review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons . . . ". The instant case does not present compelling reasons for this Court to exercise its discretionary review, as the per curiam affirmance by the Court of Appeals for the Eleventh Circuit below does not conflict with other federal circuit courts of appeal or applicable decisions of this Honorable Court and does not conflict with a state court of last resort. Instead, the Eleventh Circuit's per curiam affirmance of the district court's order of dismissal applies and follows this Court's well-established jurisprudence on procedural due process.

Petitioners' private interest and disagreement with the adverse ruling by the Eleventh Circuit and the district court does not in and of itself warrant this Court exercising its discretionary review. This Court has long established that it will not grant certiorari review except in

cases of importance to the public, as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion between the circuit courts of appeals. *Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387, 393 (1923). In this instant action, none of the criteria set forth in Rule 10 exists. Accepting jurisdiction of the instant action does nothing to insure uniformity of decisions among the circuit courts of appeals but instead would only serve the purpose of giving the Petitioners another opportunity for an appeal beyond the Court of Appeals for the Eleventh Circuit which affirmed per curiam the order of the district court and thereafter denied Petitioners' Motion for Rehearing and Rehearing en Banc.

As the decisions below are consistent with this Court's previous holdings including its most recent holding in *City of Los Angeles v. David*, 538 U.S. 715 (2003), it would serve no great or important public interest for this Honorable Court to accept certiorari review of this case. The decision below is an unpublished affirmance of a District Court's decision upholding the dismissal of Petitioners' Amended Complaint. It neither conflicts with any decisions of this Honorable Court nor creates any meaningful split of authority among the circuit courts of appeal. Nor does it present a question of great public importance.

Although the Petition may be of great importance to Petitioners and their belief that a grave injustice has been committed against them by an alleged conspiracy among code enforcement inspectors, it serves no general overall public purpose. Instead, the Petitioners' insistence that due process requires additional hearings on the issue of compliance after the initial determination of non-compliance by the CEB would only serve to impose upon

an efficient administrative process, unnecessary additional procedural steps without significant added benefits. This would make the code enforcement process unwieldy and potentially unworkable. Such would totally thwart the legitimate governmental interest in promoting, protecting and improving the health, safety and welfare of citizens in an equitable, expeditious, effective and inexpensive method of enforcing codes and ordinances and would be detrimental to public interest. Contrary to Petitioners' assertions, under the rules of this Honorable Court, plenary review is plainly unnecessary.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that certiorari jurisdiction should be denied.

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Respectfully submitted,

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